

**THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION**

**LATTIME CONSTRUCTION and
HOME BUILDING, INC.,**

PLAINTIFF,

VS.

CASE NO.: 1:05-cv-1062-MEF

**CENTURYTEL SERVICE GROUP,
L. L. C., and THE BERRY COMPANY,**

DEFENDANTS.

REQUESTED JURY INSTRUCTIONS BY PLAINTIFF

Plaintiff, Rick Lattime, moves the Court to instruct the jury herein as follows:

1. The Court charges you the jury, that a contract is a agreement between two or more persons or parties based upon a valuable consideration to do or refrain from doing a particular lawful act.

APJI 10.01

GIVEN

REFUSED

DISTRICT JUDGE

2. The Court charges you the jury, that the elements of a valid contract are:

1. Agreement between two or more competent parties.
2. Lawful object.
3. Valuable consideration.
4. Assent of the parties in the same sense - that is a "meeting of the minds."

APJI 10.02

McDonald Construction Co. vs. V. Tutt. 209 S. Supp. 451962 SD AL.

GIVEN _____

REFUSED _____

DISTRICT JUDGE

3. The Court charges you the jury, that a sufficient consideration to support a valid contract is anything of value promised or received or the doing or promising to do something which one has a legal right to do or a promise not to do something which one has the legal right to do, as the inducement to enter into the contract.

APJI 10.03

GIVEN _____

REFUSED _____

DISTRICT JUDGE

4. The Court charges you the jury, that mutual assent means the meeting of the minds of the parties to a contract. That is each agrees to all the terms and the conditions, in the same sense and with the same meaning. Agreement or mutual assent is essential to a contract.

APJI Civ. 10.06

GIVEN _____

REFUSED _____

DISTRICT JUDGE

5. The Court charges you the jury, that the Plaintiff in this action sues the Defendants for breach of contract. The elements of an action for breach of contract are as follows:

1. Existence of a contract between Plaintiff and Defendants.
2. Performance by the Plaintiff.
3. Defendants failure to perform.
4. Resulting damage to the Plaintiff.

APJI 10.12

GIVEN _____

REFUSED _____

DISTRICT JUDGE

6. The Court charges you the jury, that damages for a breach of a contract is that sum which would place the damaged party in the same condition it would have occupied if the contract had not been breached.

APJI 10.17

GIVEN _____

REFUSED _____

DISTRICT JUDGE

7. The Court charges you the jury, that if the Defendants in this case have partially performed the contract with Plaintiff but have not performed all of the important parts of the contract and if the failure to perform the balance of the contract by the Defendants is not excused, the Defendants cannot recover for the partial performance of the contract with Plaintiffs on their Counterclaim in this case.

APJI 10.20

GIVEN _____

REFUSED _____

DISTRICT JUDGE

8. The Court charges you the jury, that if you should find from the preponderance of the evidence in this case that Plaintiff is entitled to a verdict, the law provides that Plaintiff is to be fairly compensated for all damages, if any, to Plaintiff's business proximately caused by Defendant's conduct.

In arriving at the amount of the award you should include any damages suffered by Plaintiff because of lost profits; that is to say profits that Plaintiff would have made, but for the unlawful conduct of Defendants.

If you should find from a preponderance of the evidence in this case that damage to Plaintiff's business such as a loss in the profits was proximately caused by the Defendant's illegal conduct complained of, then the circumstances that the precise amount of Plaintiff's damages may be difficult to ascertain should not affect Plaintiff's recovery, particularly if Defendants wrong doings have caused a difficulty in determining the precise amount.

On the other hand, Plaintiff is not to be awarded purely speculative damages. An allowance for lost profits may be included in the damages awarded only when there is some reasonable basis in the evidence in determining the Plaintiff has, in fact, suffered a loss of profits, even though the amount of such loss may be difficult to ascertain.

In arriving at the amount of any loss of profits sustained by the Plaintiff, you are entitled to consider any past earnings of Plaintiff in the business in question as well as any other evidence in the case bearing upon the issue.

§129.30, Federal Jury Practice and Instructions, 5th Edition, page 474, 475.

Cashman v. Allied Products Corp., 761 F. 2nd 1252-1253 (8 Cir. 1985).

GIVEN _____

REFUSED _____

DISTRICT JUDGE

9. The Court charges you the jury, that lost profits must be of a nature and direct result of the breach and must be capable of ascertainment with reasonable certainty, however, if exact proof of damage is not available, all that is required is sufficient evidence to afford a reasonable basis for estimating the loss.

Alabama Law of Damages §17-1, pages 208-209, 25 C.J.S. Damages § 43.

GIVEN _____

REFUSED _____

DISTRICT JUDGE

10. The Court charges you the jury, that negligence is the failure to discharge or perform a legal duty owed to the other party.

APJI 28.00

GIVEN _____

REFUSED _____

DISTRICT JUDGE

11. The Court charges you the jury, that the duty owed by the Defendants to the Plaintiff was to exercise reasonable care not to damage the Plaintiff; that is to exercise such care as a reasonably prudent person would have exercised under the same or similar circumstances.

APJI 28.02

GIVEN _____

REFUSED _____

DISTRICT JUDGE

12. The Court charges you the jury, that damages proximately caused by an act or failure to act whenever it appears from the evidence in the case that the act or omission played a substantial part in actually causing the damage and that damage was either a direct result or a reasonably probable consequence of the act or omission.

Fed JI 80.18

GIVEN _____

REFUSED _____

DISTRICT JUDGE

13. The Court charges you the jury, that if you find the Defendants guilty of negligence in this case you may assess those damages which are fair and reasonably necessary to compensate Plaintiff for the losses it has sustained in this case.

§32-5a-51, Code of Alabama

GIVEN _____

REFUSED _____

DISTRICT JUDGE

14. The Court charges you the jury, that the purpose of awarding compensatory damages is to fairly and reasonably compensate the damaged

party for the loss or damages sustained. Compensatory damages are intended as money compensation to the party wronged to compensate it for damages which have been inflicted upon it as a proximate result of the wrong complained.

APJI 11.02

GIVEN _____

REFUSED _____

DISTRICT JUDGE

15. The Court charges you the jury, that compensatory or actual damages are allowed and should be awarded where the Plaintiff reasonably satisfies the jury from the evidence that Plaintiff has been damaged as a proximate result of an act of negligence or wantonness on the part of the Defendants or where the Plaintiff reasonably satisfies the jury from the evidence that the Plaintiff has been negligently or wantonly damaged by the Defendants.

APJI 11.01

GIVEN _____

REFUSED _____

DISTRICT JUDGE

16. The Court charges you the jury, that the Defendants are liable to Plaintiff for the damages it suffered if they were negligent and their negligence proximately caused the Plaintiff's injuries. If you find that the Defendants were negligent such negligence may be deemed the proximate cause of Plaintiff's

damages even though the Defendants could not have foreseen the precise damages suffered by the Plaintiff.

GIVEN _____

REFUSED _____

DISTRICT JUDGE

17. The Court charges you the jury, that wantonness is a conscious doing of some act or omission of some duty under knowledge of existing conditions and conscious act from the doing of such act or omission of such duty damages would likely or probably result. Before a party can be said to be guilty of wanton conduct it must be shown that with reckless indifference to the consequences they either consciously or intentionally did some wrongful act or consciously omitted some known duty which produced the damages.

APJI 29.00

GIVEN _____

REFUSED _____

DISTRICT JUDGE

18. The Court charges you the jury, that the purpose of awarding punitive damages is to allow money recovered to the Plaintiff by way of punishment to the Defendants and for the added purpose of protecting the public by deterring the Defendants and others from doing such wrong in the future. The imposition of punitive damages is entirely discretionary with the jury. Should you award punitive damages, in fixing the amount, you must take into consideration the character and degree of the wrong as shown by the

evidence in the case and the necessity of preventing similar wrongs.

APJI 11.03

GIVEN _____

REFUSED _____

DISTRICT JUDGE

19. The Court charges you the jury, that an agent is a person who, by agreement with another called the principal, acts for the principal and is subject to his control. The agreement may be oral or written or implied from the conduct of the parties and may be with or without compensation.

APJI 3.00

GIVEN _____

REFUSED _____

DISTRICT JUDGE

20. The Court charges you the jury, when an agent is engaged to perform a certain service, whatever he does to that end or in furtherance of the employment is deemed to be an act done within the scope of the employment.

APJI 3.01

GIVEN _____

REFUSED _____

DISTRICT JUDGE

21. The Court charges you the jury, that implied authority of an agent is authority to do whatever acts or use whatever means are reasonably necessary and proper to the accomplishment of the purposes for which the agency is created, so that in the conduct of the principal's business, an agent

has implied authority to do that which the nature of the business would demand in its due and regular course.

APJI 3.03

GIVEN _____

REFUSED _____

DISTRICT JUDGE

22. The Court charges you the jury, that apparent authority, for which a principal is responsible to a third-party for the act of his agent, is that authority which arising when the principal, by his acts, words, or conduct, reasonably interpreted, causes such third- party to believe that authority has been given to an agent to act in his behalf and such authority cannot be established solely by the acts of the agent.

APJI 3.04

GIVEN _____

REFUSED _____

DISTRICT JUDGE

23. The Court charges you the jury, that a principal is liable to others for the negligent acts or omissions of his agent, done within the scope of his employment and within the line of his duties.

APJI 3.06.

GIVEN _____

REFUSED _____

DISTRICT JUDGE

24. The Court charges you the jury, that to establish a third-party

beneficiary of a contract you must establish that the contracting parties intended, upon execution of the contract, to bestow a direct benefit as opposed to an incidental benefit upon the third-party.

George Dunning vs. New England Life Insurance Co. et al., 890 So. 2d 92; 2003 Ala. LEXIS 360.

GIVEN _____

REFUSED _____

DISTRICT JUDGE

25. The Court charges you the jury, that to recover under a third-party beneficiary theory, the complainant must show:

1. That the contracting party intended, at the time the contract was created, to bestow a direct benefit upon a third-party;
2. That the complainant was the intended beneficiary of the contract;
3. That the contract was breached.

(Wesley Locke vs. Ozark Board of Education, 910 So., 2d 1247 2005 Ala LEXIS 55; 22 I.E.R. Cas. (BNA) 1617.

GIVEN _____

REFUSED _____

DISTRICT JUDGE

26. The Court charges you the jury, that if you believe the evidence in this case you must find for the Plaintiff.

GIVEN _____

REFUSED _____

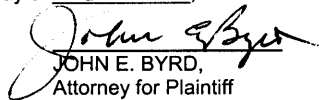
DISTRICT JUDGE

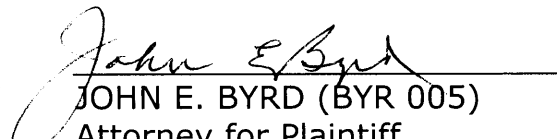
Dated this the 7 day of February, 2007.

CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the foregoing upon the Honorable Craig A. Alexander, Rumberger, Kirk, & Caldwell, Attorneys at Law, Lakeshore Park Plaza, Suite 125, 2204 Lakeshore Drive, Birmingham, Alabama 35209 by placing a copy of same properly addressed and postage prepaid in the U.S. mail.

Dated this the 7 day of Feb., 2007.


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